No. 84–1425 (2)

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IN THE

Supreme Court of the United States

October Term, 1984

NORTHERN ILLINOIS GAS COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief of American Gas Association As *Amicus Curiae* in Support of Petition for a Writ of Certiorari

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The American Gas Association (A.G.A.) submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by the Northern Illinois Gas Company (NI-Gas). Both questions presented should receive plenary review by this Court.[1]

INTEREST OF THE *AMICUS CURIAE*

A.G.A. is a national association representing the interests of approximately 300 member companies involved in the distribution and transmission of natural gas throughout the 50 states. Members of the A.G.A. account for approximately 85 percent of all domestic utility sales of natural gas to end-users. NI-Gas, the petitioner in this case, is a member of A.G.A.

The Internal Revenue Service (Service) has adopted a position which, if sustained, will impose heavier tax burdens on natural gas (and other) utilities than permitted under the federal Highway Use Tax, 26 U.S.C. §§4481-4484 (1956).

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[1]Written permission to file this brief as *amicus curiae* has been obtained from the parties and is on file with the Clerk.

The result has been to increase the amounts paid for utility gas service by all end-users, including approximately 41 million domestic residences served by A.G.A. membership.[2] The United States Court of Appeals for the Seventh Circuit has ruled in favor of the Service. This decision is in direct conflict with holdings of the Ninth Circuit in *Pacific Gas and Electric Co.* v. *United States*, 664 F.2d 1133 (9th Circ. 1981), *on remand*, 554 F. Supp. 345 (N.D. Cal. 1983), and the United States Claims Court in *Minnesota Power & Light Co.* v. *United States*, _____ F. Supp. _____, 6 Cl. Ct. 558 (1984). The Eighth Circuit has also ruled in favor of the Service, *Northern States Power Co.* v. *United States*, 663 F.2d 55 (8th Cir. 1981), *cert. denied*, 456 U.S. 965 (1982). The conflict in these decisions is of vital importance to members of A.G.A. doing business in circuits where decisions have been rendered and to other members doing business within the other circuits which have not yet ruled on the issue but which may be influenced by the conflicting decisions.

This litigation involves straightforward principles of statutory construction which, in view of the diametrically opposed conclusions of the split circuits, should be immediately resolved by this Court in order to provide a uniform approach to establishing tax liability, so essential to a federal system of taxation. The necessity for resolution of this conflict by this Court is also indicated by the substantial number of cases in which this issue is involved. Many of these cases involve A.G.A. members.

ARGUMENT

Gas utility companies own all-purpose trucks which are commonly equipped with "pintle-hooks." A pintle hook is a device which allows a trailer to be connected to the truck. Trucks are equipped with pintle hooks because it is economical to use them either without trailers or with different types of

[2]Taxes paid by gas utilities normally constitute a business expense appropriately subsidized by utility ratepayers. See Holtzinger, "Taxes Other Than Income Taxes," *Regulation of the Gas Industry* (Matthew Bender, 1984), p. 27-3.

trailers. Whether trucks are used in tandem with trailers is important from the standpoint of federal tax law, because the Highway Use Tax statute is based, not unreasonably, on the theory that those who subject highways to more demanding use, for example by use of trailers in tandem with trucks, should be subject to a higher tax liability to support highway upkeep. The federal statute accomplishes this by simply imposing a tax on the "taxable gross weight" of motor vehicles, and including within the gross weight the weight of trailers under specified circumstances. The statute allows the Service to add the weight of trailers to the weight of vehicles where the vehicles are "fully equipped for service" and when the trailers are "customarily used in connection with highway motor vehicles of the same type as such highway motor vehicle." 26 U.S.C. §4482(b) (1) (B).

Reversing its long-standing contrary position, the Service has now construed this statute to mean that a utility truck to which a pintle hook is attached is a truck-trailer combination to which the weight of the trailer must be imputed for establishment of taxable gross weight. Rev. Rul. 76-294, 1976-2 C.B. 364. The statute, however, allows the Service to impute the trailer's weight only when the two are "customarily used" together.

Although Congress has enacted clarifying legislation that resolves the problem prospectively after June 30, 1984,[3] the application of the provision at issue here to prior periods has substantial continuing significance for a large number of taxpayers. The total tax amounts at stake nationwide are likely to be sizable. See Pet. 8 & 9. Even in the absence of a conflict, this Court in similar circumstances has agreed to review the application of subsequently amended tax provisions where the issue would affect "the tax treatment of substantial sums." *United States* v. *Chicago, Burlington & Quincy Railroad Co.*, 412 U.S. 401, 404 (1973). The question in that case arose under a provision of the Internal Revenue Code of 1939 which had been amended prospectively by the Internal Revenue Code

[3] 26 U.S.C. §4482 (c) (5) enacted by Pub. L. No. 97-424, 97th Cong., 2d Sess. §513(c) (1983).

of 1954. There, as here, the issue had continuing importance because of its application to prior periods that remained open. The importance of the question in the present case is sharpened by the prospect, if review were denied, that the tax would be applied differently to taxpayers depending solely on their geographical location.

The A.G.A. agrees fully with the arguments presented in the NI-Gas petition. The circuits are squarely in conflict on an important issue that affects nearly every utility. This Court should resolve the conflict to assure uniform application of the tax law throughout the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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